

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CARLOS HIDALGO, et al.,

Plaintiffs,

v.
NATIONAL DEFAULT SERVICING
CORPORATION, et al.,

Defendants.

Case No. 2:13-cv-00196-MMD-CWH

ORDER

(Plaintiffs' Motion for Temporary
Restraining Order – dkt. no. 12)

I. INTRODUCTION

Before the Court is Plaintiffs' Motion for a Temporary Training Order ("TRO"). (Dkt. no. 12.) For the reasons set forth below, the Motion is denied.

II. BACKGROUND

On November 8, 2005, Plaintiffs Carlos and Brigitte Hidalgo purchased the Property located at 9625 Lost Prospect Court, Las Vegas, Nevada 89178 ("Property"). On November 18, 2005, Plaintiffs executed a Deed of Trust and Note for \$513,885.00. Defendant Wells Fargo was listed as the Lender and Beneficiary and United Title of Nevada was listed as the Trustee under the Deed of Trust. On March 6, 2010, a Notice of Default and Election to Sell under the Deed of Trust ("Notice of Default") was recorded in the Clark County's Recorder's Office. The date of Plaintiffs' default was listed as July 2009.

On September 14, 2012, a Notice of Rescission of Notice of Default was recorded in the Clark County Recorder's Office, rescinding the Notice of Default recorded on

1 March 2010. On July 19, 2010, Plaintiffs executed a Loan Modification Agreement on
2 the November 2005 Deed of Trust and Note. On July 18, 2012, a Corporation
3 Assignment of Deed of Trust was recorded in the Clark County Recorder's Office. In
4 that Assignment, Wells Fargo transferred and assigned all interest in the November
5 2005 Note and Deed of Trust to HSBC. On July 18, 2012, a Substitution of Trustee was
6 recorded in the Clark County Recorder's Office by National Default Servicing
7 Corporation ("NDSC"), substituting itself as Trustee under the November 2005 Deed of
8 Trust. (Dkt. no. 14, ex. G.) On August 27, 2012, NDSC recorded a Notice of Default in
9 the Clark County Recorder's Office, listing the date of Plaintiffs' default as October 1,
10 2011. (*Id.* at ex. H.)

11 On December 7, 2012, a Certificate from the Nevada Foreclosure Mediation
12 Program was recorded in the Clark County Recorder's Office allowing the Beneficiary to
13 proceed with a foreclosure on the Property. On December 31, 2012, NDSC recorded a
14 Notice of Trustee's Sale in the Clark County Recorder's Office, listing the amount due
15 and owing on the November 2005 Note as \$597,159.29. (Dkt. no. 14, ex. J.)

16 On January 18, 2013, Plaintiffs filed a Complaint in the Eighth Judicial District of
17 Clark County, Nevada. The court granted Plaintiffs a TRO on January 26, 2013.
18 Plaintiffs filed a Motion for a Preliminary Injunction that same day. Defendant Wells
19 Fargo removed the case to this Court on February 6, 2013. On February 13, 2013,
20 Plaintiffs filed a Motion to Amend their Complaint and a Motion for Preliminary Injunction.
21 Plaintiffs filed this Motion on February 19, 2013. A foreclosure sale on the Property is
22 scheduled for February 25, 2013.

23 **III. MOTION FOR TEMPORARY RESTRAINING ORDER**

24 **A. Legal Standard**

25 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary
26 restraining orders, and requires that a motion for temporary restraining order include
27 "specific facts in an affidavit or a verified complaint [that] clearly show that immediate
28 and irreparable injury, loss, or damage will result to the movant before the adverse party

1 can be heard in opposition," as well as written certification from the movant's attorney
 2 stating "any efforts made to give notice and the reasons why it should not be required."
 3 Fed. R. Civ. P. 65(b).

4 Temporary restraining orders are governed by the same standard applicable to
 5 preliminary injunctions. See *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F. 3d
 6 832, n.7 (9th Cir. 2001). Further, a temporary restraining order "should be restricted to
 7 serving [its] underlying purpose of preserving the status quo and preventing irreparable
 8 harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose*
 9 *Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S.
 10 423, 439 (1974).

11 A temporary restraining order may be issued if a plaintiff establishes: (1) likelihood
 12 of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary
 13 relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the
 14 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Injunctive
 15 relief [is] an extraordinary remedy that may only be awarded upon a clear showing that
 16 the plaintiff is entitled to such relief." *Id.* at 22. The Ninth Circuit has held that "serious
 17 questions going to the merits' and a hardship balance that tips sharply toward the
 18 plaintiff can support issuance of an injunction, assuming the other two elements of the
 19 *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132
 20 (9th Cir. 2011).

21 **B. Plaintiffs are Unlikely to Succeed on the Merits**

22 Plaintiffs do not deny that they have defaulted on their loan. Rather, they argue
 23 that their home was defectively foreclosed upon because Defendants did not comply
 24 with the notice requirements of Nevada's foreclosure statute, NRS § 107.080(2)(c). The
 25 statute states:

26 (c) The beneficiary, the successor in interest of the beneficiary or the
 27 trustee first executes and causes to be recorded in the office of the
 28 recorder of the county wherein the trust property, or some part thereof, is
 situated a notice of the breach and of the election to sell or cause to be
 sold the property to satisfy the obligation which, except as otherwise

1 provided in this paragraph, includes a notarized affidavit of authority to
2 exercise the power of sale stating, **based on personal knowledge** and
under the penalty of perjury:

- 3 (1) The full name and business address of the trustee or the
trustee's personal representative or assignee, the current holder of
the note secured by the deed of trust, the current beneficiary of
record and the servicers of the obligation or debt secured by the
deed of trust;
- 6 (2) The full name and last known business address of every prior
known beneficiary of the deed of trust;
- 8 (3) That the beneficiary under the deed of trust, the successor in
interest of the beneficiary or the trustee is in actual or constructive
possession of the note secured by the deed of trust;
- 10 (4) That the trustee has the authority to exercise the power of sale
with respect to the property pursuant to the instruction of the
beneficiary of record and the current holder of the note secured by
the deed of trust;
- 12 (5) The amount in default, the principal amount of the obligation or
debt secured by the deed of trust, a good faith estimate of all fees
imposed and to be imposed because of the default and the costs
and fees charged to the debtor in connection with the exercise of the
power of sale; and
- 15 (6) The date, recordation number or other unique designation of the
instrument that conveyed the interest of each beneficiary and a
description of the instrument that conveyed the interest of each
beneficiary.

18 NRS § 107.080(2)(c) (emphasis added).

19 Here, the affiant Kelly Cornelious, Vice President of Loan Documentation for
20 Wells Fargo, stated that her knowledge regarding the facts required concerning the
21 Property's foreclosure (the requirements of NRS § 107.080(2)(c)(1)-(6)) were known to
22 her "based upon [her] personal review of business records of Wells Fargo which have
23 been presented to [her] to be true by persons employed by Wells Fargo . . ." (dkt. no.
24 12 at 80). Plaintiffs argue that this statement does not meet the requirements of NRS §
25 107.080(2)(c), because Cornelious did not testify based on her *personal* knowledge, but
26 rather her knowledge of the NRS § 107.080(2)(c)(1)-(6) requirements based on her
27 review of Wells Fargo's records.

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1 The Court disagrees with Plaintiffs' interpretation of the statute. The first step in
2 statutory construction "is to determine whether the language at issue has a plain and
3 unambiguous meaning with regard to the particular dispute in the case." *Barnhart v.*
4 *Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "[C]ourts in the Ninth Circuit have
5 determined that '[p]ersonal knowledge . . . is not strictly limited to activities in which the
6 declarant has personally participated.'" *Marceau v. Idaho*, 1:09-CV-00514-N-EJL, 2011
7 WL 3439178, at *8 (D. Idaho Aug. 5, 2011) (*quoting Washington Cent. R.R. Co., Inc. v.*
8 *Natl' Mediation Bd.*, 830 F. Supp. 1343, 1352-53 (E.D. Wash. 1993)). Rather,
9 "[p]ersonal knowledge can come from the review of the contents of business records,
10 and an affiant may testify to acts that she did not personally observe but which have
11 been described in business records." *AT & T Corp. v. Overdrive, Inc.*, 2006 WL
12 3392746, at *2 (N.D. Ohio Nov. 21, 2006).

13 Moreover, here, because of Cornelious' position within Wells Fargo, the Court
14 determines that she had personal knowledge of the information. "Personal knowledge
15 can be inferred from a declarant's position within a company or business." *Edwards v.*
16 *Toys 'R Us*, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (*citing In re Kaypro*, 218 F.3d
17 1070, 1075 (9th Cir. 2000) ("Personal knowledge may be inferred from a declarant's
18 position"); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206
19 F.3d 1322, 1330 (9th Cir. 2000); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999,
20 1018 (9th Cir. 1990) (concluding that a CEO's personal knowledge of various corporate
21 activities could be presumed)). Cornelious' position as Vice President of Loan
22 Documentation for Wells Fargo allows the Court to infer that she did in fact have
23 personal knowledge of the facts contained in her Affidavit of Authority in Support of the
24 Notice of Default.

25 **C. Irreparable Harm, Balance of Equities, and Public Interest**

26 Plaintiffs cannot demonstrate a likelihood of success on the merits. Though a
27 foreclosure sale would undoubtedly cause Plaintiffs irreparable harm, the Court holds
28 that the balance of equities and the public interest do not weigh in favor of granting

1 extraordinary relief to Plaintiffs. Granting the TRO would only further prolong the
2 inevitable foreclosure sale of Plaintiffs' Property, as Plaintiffs are unlikely to succeed on
3 their claim that Defendants defectively foreclosed upon the Property.

4 **IV. CONCLUSION**

5 IT IS HEREBY ORDERED that Plaintiffs' Motion for a Temporary Restraining
6 Order (dkt. no. 12) is DENIED.

7 IT IS FURTHER ORDERED that the Motion for Preliminary Injunction hearing
8 originally scheduled for March 5, 2013 (dkt. no. 5), is VACATED.

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10 ENTERED THIS 21st day of February 2013.

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13 MIRANDA M. DU
14 UNITED STATES DISTRICT JUDGE
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